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Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter

Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

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MM Docket No. 98-35

ASSOCIATION OF LOCAL TELEVISION STATIONS

Association of Local Television Stations, Inc.

Reply Comments
to the Notice of Inquiry

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Executive Summary

ALTV continues to believe the UHF discount should be retained as part of the FCC national television multiple ownership rules. The technical foundations for the rule remain solid. UHF stations still suffer a significant handicap in the video marketplace. The expansion of cable television has not closed the gap between UHF and VHF stations. Studies that analyzed ratings and long term economic performance demonstrate conclusively that a UHF disparity still exists.

Digital television will not equalize VHF and UHF facilities. The increased interference caused by the deployment of DTV will increase the technical problems confronting UHF analog stations. In fact, the technical problems confronting these stations will be greater than the technical problems that existed when the discount was enacted in 1984. Through replication, the current disparity between UHF and VHF facilities will continue in the DTV world.

The UHF discount has fostered diversity and competition. It has helped create new, UHF-based national broadcast networks including Fox, UPN, WB, and Pax TV. Eliminating the rule would harm diversity by decreasing competition to the traditional VHF-based ABC, CBS, and NBC networks.

The broadcast/cable television cross-ownership rule should be retained. While there are a number of diverse and competitive voices in local video markets, this rule prevents anti-competitive conduct. Unlike other local combinations (*e.g.* newspaper/broadcast or television duopolies), a broadcast/cable combination, through control of the video pipeline, could harm competition by discriminating against competing television stations. This is especially true with respect to the carriage of new DTV channels.

There is no justification for the continuation of the newspaper/television cross-ownership rule. It should be eliminated. There are numerous voices in local markets today. There is absolutely no evidence in the record to demonstrate that these combinations would harm diversity or competition. To the contrary, there is significant evidence that such combinations would enhance diversity and provide superior broadcast service.

While the local television duopoly rule is not part of this proceeding, several parties commented on the rule in their initial comments. ALTV supports relaxation of the rules to permit UHF/UHF and UHF/VHF combinations in local markets. We also support the permanent grand-fathering of LMAs. To the extent the FCC will consider the television duopoly rule or its LMA policies in this proceeding, ALTV incorporates its prior filings into this record. Specifically, ALTV attaches its study, "Local Marketing Agreements and the Public Interest: A Supplemental Report" as Appendix A.

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In the Matter of **Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996**	**MM Docket No. 98-35**

Reply Comments
of the

Association of Local Television Stations, Inc.

In our initial comments, the Association of Local Television Stations (ALTV) urged the Commission to:

- **Retain the UHF discount as part of the national ownership rules**
- **Retain the cable/broadcast cross-ownership rule**
- **Eliminate the newspaper/television cross-ownership rule**
- **Relax the local television ownership rules**

The overwhelming number of comments filed in this proceeding support these positions. We urge the FCC to consider them carefully as it proceeds with the first three issues. In addition, while the *Notice* specifically stated that the local television ownership rules were not part of this proceeding, several commenters addressed this issue. To the extent the FCC may consider these issues in the context of this proceeding, we will briefly address this rule.

I. The UHF Discount Should Be Retained

A majority of commenters, including NAB, CBS, Paxson, Univision, Telemundo, Fox, and USA Broadcasting all support retaining the discount.[1] Those supporting the retention of the UHF discount agreed with ALTV on three basic facts: 1) the technical handicap to UHF stations remains, 2) the growth of cable and other technical developments has not eliminated the handicap, and 3) the advent of digital television will not eliminate the disparity.

Parties seeking elimination of the UHF discount assert that improvements in television broadcasting have obviated the need for the discount. For the most part, these are general assertions with little or no engineering, financial, any other evidence to support their claims.

[1] Those opposing the discount were ABC, NBC, Center for Media Education *et al.,* Press Communications, Office of Communications United Church of Christ *et al.,*and the National Organization for Women Foundation.

The Center for Media Education, *et al.* (CME) states that "the original justification for the discount, *i.e.* the inadequacy of UHF reception is no longer applicable.[2] According to CME, the difference in quality of reception between UHF and VHF stations has diminished with the combination of the must-carry rules and increased cable penetration." [3] CME, however, provides absolutely no evidence to support the assertion that the "difference" between VHF and UHF stations has *diminished* over time.[4]

ABC's justification for eliminating the rule is interesting.[5] Based on its comments, it has little or no concern with increased concentration at the national level. To the contrary, it believes the public interest would be served by increasing concentration and group ownership. Despite this position, ABC would have the FCC eliminate the UHF discount and force several group owners to divest some of their television station interests. In short, in the absence of a relaxation

[2]Similarly, the letter filed by the National Organization for Women Foundation contains no evidence to support its claim for eliminating the UHF discount. Such a "political" letter has no evidentiary value in this proceeding.

[3]Comments of Center for Media Education *et al.*, at 17.

[4]It would appear that CMA is actually relying on cable carriage for its claims. This will be discussed, *infra*. Nonetheless, it is ironic that a consortium of so-called public interest groups would so readily dismiss the UHF reception problems encountered by those who do not subscribe to cable. *See* CMA Comments at 18, n. 65. Those who do not subscribe to cable receive superior service *because* of the UHF discount. CME would sacrifice such superior service on some theoretical notion that the UHF discount harms "diversity." As will be noted, *infra,* the UHF discount fosters diversity at both the national and local levels.

[5]NBC also urges that if the FCC keeps the 35 percent national cap, it should eliminate the UHF discount. Unlike ABC, NBC does not suggest existing combinations be divested.

of the national ownership rules, it would have the FCC make the national ownership rule more restrictive by eliminating the UHF discount.

ABC's position is curious. With regard to the issue of competition, ABC states:

> At the same time, retention of the rule would lead to anti-competitive results because it prevents broadcasters from pursuing economies of scale that could generate enhanced financial resources needed to compete more effectively in this increasingly competitive environment. The rule prevents stations from being owned by entities most able to put them to efficient and valuable use — a result that makes no economic sense — and imposes an artificially small scale operation on the broadcast industry.[6]

With respect to diversity, ABC notes:

> Diversity considerations do not alter these conclusions. Common ownership across markets would do nothing to lessen outlet diversity in any market. Indeed, if anything, the evidence shows that group owners generally tend to promote diversity. The primary focus of the Commission's diversity concerns is local news and public affairs programming. Group owned stations generally devote more time to such programs than non-group-owned stations.[7]

Given these statements it makes little sense for ABC to argue for elimination of the UHF discount (if the FCC decides to keep the 35% national audience reach cap). To the extent ABC believes that group ownership is good for the country, then retaining the UHF discount would be in the public interest because it fosters increased group ownership. Why deny the American public these benefits? Specifically, why deny the American public the benefits associated with

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[6]Comments of ABC, Inc. at 6.

[7]*Id* at 7.

the group ownership of UHF stations such as Fox and Paxson (which ABC is willing to see divest)?

ABC certainly cannot be arguing that the group owners with large UHF portfolios do not provide benefits similar to those with VHF stations? If so, no such evidence has been placed in the record. The economies and programming benefits associated with group ownership emanate from both UHF and VHF group ownership. (This seems consistent with ABC's assertion that the two facilities are comparable.)

Also, ABC certainly cannot be asserting that group owners with large UHF portfolios somehow have an unfair competitive advantage. The UHF discount has been in effect since 1984. Over the past 18 years, ABC, Inc. (Disney) had both the knowledge and financial resources to acquire a large portfolio of UHF stations and employ the UHF discount. Indeed, if ABC's claims regarding the comparability of UHF facilities are correct, one wonders why it did not purchase UHF stations. Indeed, why not swap its current portfolio of VHF stations for UHF facilities in the same market?

The reason is obvious: UHF facilities are not comparable to VHF stations. ABC knows it. The difference in value between VHF and UHF stations is well known to ABC/Disney's top corporate officers. While at Fox, Preston Padden commented on Fox's decision to shift from UHF to VHF affiliates:

> Well, if you look at the top 25 markets, for example, between the stations we own and the New World stations we're making substantial strides toward achieving a broader VHF platform. I can't tell you at what point the process will have ended, but I do think the result is going to be a more even distribution of VHF and UHF distribution platforms among the four networks. That really has been our goal. When we started we had almost all the UHF slots and the other guys had almost all the Vs.[8]

Further commenting on Fox's affiliate switches, Robert Iger, president and COO of Capital Cities/ABC stated:

> Our strategy was to maintain stability in those top markets because we thought that was important not only in terms of dealing with the consumer but also with the advertiser. Fox has improved itself in terms of its distribution system by virtue of the fact that a significant number of its stations are now VHF versus UHF.[9]

The difference between a VHF and UHF station is so important that ABC spent tens of millions of dollars in additional compensation to secure major VHF group-owned stations as ABC affiliates.[10] If the difference between VHF and UHF stations was as minor as ABC now claims, then it wasted a considerable amount of money in compensation. The fact is, regardless of cable coverage, VHF stations are stronger and have much larger coverage areas than their

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[8]Preston Padden: Strategizing to Move Fox From Underdog to Head of the Pack, *Broadcasting and Cable*, October 17, 1994, at 19

[9]*Broadcasting and Cable,* October 31, 1994, at 31.

[10]See "ABC Bags Hearst for Long-term Affiliation Deal," *Broadcasting and Cable* July 25, 1994 at 6; "Affiliation Deal Will Cost ABC Millions," *Broadcasting & Cable*, August 1, 1994 at 11.

UHF counterparts. Indeed, ABC owns no UHF stations in any market where its UHF O&O would be competing with a local VHF station. [11]

The issue then is why would ABC take a position that supports increased national ownership, but — if it does not get its way — support a more restrictive rule which requires the divestiture of other companies? The answer of course is simple — use the regulatory process to kill the competition.

ABC's position proves the point. The UHF discount fostered the development of new competing networks. Fox, UPN, WB, and now Pax TV are all UHF-based networks. They have been built around group owners with large UHF station portfolios. The competition provided by these networks has no doubt caught ABC's attention.

A. Technical Issues

Motives aside, ABC does raise some specific technical issues regarding the comparability of VHF and UHF facilities. At the outset ABC asserts that the FCC cited no engineering analysis at the time the discount was adopted. To the contrary, the 1985 order referenced the Commission's evaluations of the UHF Comparability Task Force. [12] The 1982 Task Force had

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[11] *1998 Television and Cable Factbook* at A-1-2, 6-55.

[12] *See Memorandum Opinion and Order, National Multiple Ownership Rules*, 100 FCC2d, 74, 93 at n.54., *citing, Report and Order: Improvements to UHF Television Reception*, Gen. Docket No. 78-391, 90 FCC 2d 1121, 1124 (1982).

examined both the engineering, technical and economic status of UHF television in a series of ten reports. Based on the results of that task force, the FCC concluded that "actual equality between the UHF and VHF television services cannot be expected to be achieved due to fundamental laws of physics."[13] Indeed, the FCC decided not to adopt additional technical regulations on television set manufacturers because attempting to make UHF stations technically equal to VHF stations was an impossible task.[14] Nonetheless the FCC recognized that UHF stations are disadvantaged from the transmission side because they must transmit at much higher and more costly power levels in order to be received adequately.[15] Because of the higher transmission costs, many broadcasters did not operate at maximum allowed power levels.[16] From the receiver side, the Task Force noted that assumptions about UHF receiving equipment had been overly optimistic, overstated the quality of antenna equipment, and concluded that additional regulatory control over receivers would not eliminate the major difficulty of receiving antenna systems.[17]

Additional evidence was contained in the Network Staff Inquiry Report. There, the Inquiry Staff presented data demonstrating that the actual coverage area of a UHF station was

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[13] *Report and Order: Improvements to UHF Television Reception*, Gen Docket No. 78-391, 90 FCC 2d 1121, 1124-1125 (1982)

[14] *Id.*

[15] *Id.* at 1125

[16] *Id.* at 1124

[17] *Id.*

approximately half that of the VHF counterpart. This is before one even considered the problems associated with antennas.[18] Thus, when adopting the 50 percent audience reach discount the FCC knew full well the nature and scope of the UHF handicap. It also knew that no additional regulatory efforts would be expended to make UHF technology and transmission more comparable to VHF facilities.

On this point ABC simply observes that the 50 percent discount is irrational. It notes that UHF stations are legally authorized to operate at 5000 kW, while VHF stations operate at much lower power.[19] Moreover, maximum VHF power varies depending on the geographic location of the station (Zone I or II). The analysis is irrelevant. Because of the problems involved with transmission and reception, most UHF stations never operated at maximum facilities. The actual contours were not equal. The UHF discount was based on the real world disparities facing UHF broadcasters, not the maximum power limits in the FCC's rules.

The FCC's position was recently confirmed in an engineering statement submitted in this proceeding by the noted engineer, Jules Cohen.[20] Looking at the actual power levels broadcast by UHF stations, he found that the average Grade B coverage area of a UHF station in Zone I is

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[18]*Network Inquiry Staff Report* vol 1 at 70 - 71 (1980)

[19]ABC, Inc. Comments at 19.

[20]Jules Cohen P.E., *Engineering Statement Comparison of VHF and UHF Television Service*, submitted in Joint Comments of Fox Television Stations, Inc., and USA Broadcasting Inc., Appendix B at 2-3.

only 64.7 percent of a high band VHF station and 54.8 percent of the coverage area of a low band VHF station. In the rest of the country a UHF station operating at 2500 KW has a coverage area of 58.6 percent of a low band VHF station and only 66.8 percent of the high band VHF station. Again, this only represents the transmission side of the problem. It takes no account of reception problems due to poor quality antennas.

The selection of a 50 percent discount of UHF stations was not an arbitrary decision. It is a realistic approximation of the UHF handicap as it actually exists in the marketplace. The Commission has the discretion to make reasonable judgements and enact generalized rules. The existing discount is a reasonable approximation of the technical problems confronting UHF stations.

B. Cable Carriage Has Not Reduced the VHF/UHF Gap

The parties seeking elimination of the UHF discount assert that cable carriage has narrowed the gap between UHF and VHF stations. Once again there is no empirical evidence to support these claims, only assertions. Indeed, ABC attempts to diminish the discount claiming that it should only apply to non-cable subscribers. According to ABC, the 50 percent discount should only apply to the 35 percent of the population that does not subscribe to cable — reducing the discount to roughly 16 percent. The argument misses the mark on several levels.

Cable carriage was never a relevant consideration in granting the UHF discount. At the time the discount was adopted, December 1984, the FCC's must-carry obligations were in full force and effect. (The *Quincy* decision, which struck down the original must-carry rules was not decided until July 1985.) Indeed, the FCC recognized in 1984 that there were 6,400 systems with 32-35 million subscribers, passing 64 percent of all television households.[21] While this number is obviously less than today's cable penetration, it was significant enough, particularly in major markets, to have had an impact on the FCC's decision. It did not. There is no evidence that the FCC intended that the discount should be either reduced or eliminated simply because a UHF station was carried on a cable system. There is sound reasoning for this approach.

The growth of cable has not reduced the disparity between UHF and VHF stations. As we observed in our initial comments, the evidence shows that the opposite is true. The studies submitted in this proceeding conclusively demonstrate that UHF stations, even during periods of mandatory cable carriage, still suffer a significant disparity. There are several reasons for this conclusion.

First, UHF stations still suffer from channel positioning problems on cable systems. Securing a low channel number on a cable system is extremely important. For a variety of marketing and historical reasons, VHF stations have been able to secure low number channel positioning (2-13). UHF stations, on the other hand, are often found "on channel" (14 - 69). In order to watch UHF stations, consumers have to "surf" through a number of broadcast and cable

[21]*Report and Order* in MM Docket No. 83-1009, 100 FCC 2d, 1, 28 (1984)

channels, resulting in lower ratings. The 1992 Cable Act has essentially locked these channel positions in place.[22]

A second problem deals with the carriage itself. As we observed in our initial comments, cable systems have the ability to petition the FCC and exclude certain communities from a television station's market. In most instances these waiver petitions have involved UHF stations. As a result, the coverage of UHF stations may not be as extensive as their VHF counterparts. This is especially true since cable carriage depends on providing a Grade B signal to the cable systems head end. As noted above, however, the Grade B contour of a UHF station is generally smaller than the Grade B contour of a VHF facility.

Third, even if cable helped improve the reception of a UHF signal, the net effect on the UHF station is negative. With its multiple channels. cable takes audience away from local stations.[23] This is especially true with respect to UHF stations. Furthermore, even in cable household not all sets are connected to cable.

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[22]The 1992 Act gave local broadcasters a choice of three options 1) carriage on the FCC designated channel number, 2) carriage on the channel a station was carried in 1985, and 3) on a channel by mutual agreement. While there are some exceptions, these options have resulted in most UHF stations being positioned on the cable channels corresponding to their channel number.

[23]See ALTV Comments at 32, *citing* Bear Stearns, *Cable & Broadcasting Industry Statistics*, October, 1997, at 91.

Those suggesting that cable has eliminated the need for the UHF handicap offer no proof that this is the case. If cable, along with other technical improvements, closed the gap between UHF and VHF stations, then one would expect ratings and profitability to be similar. The contrary is true. The gap between UHF and VHF stations has not closed. Various studies submitted in this proceeding prove the point:

Ratings Studies

- *Everett Study*: Examined average prime time ratings for VHF (9.8) and UHF affiliates (6.4). It found a ratings difference of 3.8 ratings points or a 34 percent difference in ratings. This handicap was more pronounced for ABC and NBC affiliates than for CBS and Fox affiliates.[24]

- *ALTV Study of Fox Programming*: Based on the 1993 ratings for the Fox network during the first hour of prime time, UHF stations averaged a 2.09 ratings point handicap for the same Fox programming on VHF affiliates.[25]

- *ALTV Study of Syndicated Programming:* Examined the ratings of over 494 television stations in 1993, the study found a -37.8 percent ratings handicap for first run programs, -38.7 percent UHF ratings handicap for off-network programs and a -29 percent UHF ratings handicap for off-Fox syndicated programs *vis-a-vis* the same programming on VHF stations.[26]

- *Affiliate and Independent Ratings Study*: In 29 of the 33 markets where a UHF affiliate competes against a network VHF affiliate, the UHF station was the lowest rated. In all 19 markets where UHF independents competed against VHF independents, the UHF stations were always lower rated.[27]

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[24]Everett, Stephen, "The UHF Penalty Demonstrated", submitted in Comments of the National Association of Broadcasters, July 21, 1998 at Appendix C.

[25]ALTV Comments at Exhibit A

[26]ALTV Comments at Exhibit B.

[27]ALTV Comments at Exhibit C.

- *Affiliate Switch Study*: Examined the ratings decline associated with switching an NBC, CBS and ABC affiliation from a VHF to a UHF station. The ratings decline in the 16 markets that were studied ranged from 30 to 72 percent.[28]

The ratings disparity translates directly into reduced income and profitability. Again, if cable had eliminated the disparity, one would expect the profitability of UHF and VHF stations to be roughly comparable. They are not.

Economic Studies

- *Fratrik Study Financial Handicap 1993-1996*: Average UHF affiliate generates less than 50 percent of the revenues of an average VHF affiliate, one-third of the cash flow and less than a quarter of the pre-tax profits.
- *ALTV 1975-1992 Financial Study*: The profitability gap between UHF affiliates stations and all (VHF) affiliates grew. This empirically denies the notion that improvements in antenna and receiver technology, as well as cable carriage, closed the gap between UHF and VHF stations.

This real world evidence has not been controverted. The Commission must balance these data against ABC's mere assertions that the UHF and VHF stations have become comparable. The shift to digital television will not resolve this problem. To the contrary, the FCC's DTV orders highlight the continued disparity.

C. DTV Will Not Eliminate The UHF Handicap

Opponents assert that the shift to digital television will eliminate the need for the UHF discount. This argument rests on the faulty assumption that DTV stations assigned in the UHF

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[28] ALTV Comments Table 3 at 23.

band are all equal. In fact, the opposite is true. Our initial comments made the following observations which remain uncontested.

- *The discount is an analog rule*: The UHF discount applies to the ownership of analog stations. Any purported equalization of signals in the digital world is irrelevant. Indeed, at least in the context of the local ownership rules, the FCC has determined that digital channel assignments are irrelevant to the existing analog television duopoly rule.

- *Interference problems will become worse for UHF analog stations*: To squeeze in the DTV channels, the FCC, out of necessity, has permitted additional interference to existing analog UHF stations. New upgrades have been limited to avoid interference with new DTV stations. Interference protections have been relaxed from the predicted Grade B contour to the UHF analog station's actual contour. Consequently, the UHF interference and transmission problems are worse today than they were in 1984, when the discount was adopted.

- *DTV replication will continue the UHF analog handicap*: UHF DTV assignments are based on replicating the *actual* coverage areas of existing VHF and UHF television stations. Accordingly, there is a class of UHF DTV stations that have been given the power to replicate a VHF Grade B signal (V/Us). In order to replicate the coverage area of a VHF analog Grade B signal, these V/U stations have been given up to 20 times the power of U/U DTV stations. The U/U stations have been given minimal power because the service areas of the UHF analog stations that they are replicating are smaller than VHF stations.[29] The FCC noted that there are "difficulties that UHF stations may face under the current service replication plan... in competing with higher powered DTV service of existing VHF stations."[30]

- *Limited power increases to U/U DTV stations will not eliminate the disparity*: On reconsideration the FCC permitted U/U stations to increase power with tilt beam antennas. However, they are not permitted to expand their coverage area in the process. Also, some U/U stations may increase power only up to 200 KW. This is still lower than comparable V/U DTV stations in the same market. Moreover,

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[29]The FCC DTV Reconsideration decision in DTV recognized this inherent problem: *See* Comments of Paxson Communications at 13. Paxson documents a power disadvantage for six stations in major markets ranging from a 37 percent to a 95 percent power disparity.

[30]*Memorandum Opinion and Order, DTV Reconsideration*, 13 FCC Rcd at 7450, para 79.

the result of these power increases will be to increase interference to UHF analog stations, thereby exacerbating the analog UHF handicap.[31]

- *DTV operations on VHF channels*: VHF stations have the option of moving their DTV operations back to VHF channels. Also, some VHF stations have already been assigned DTV stations in the VHF band. As a result, the advantages of VHF broadcasting, lower transmission costs and better coverage, will remain with these VHF stations.

- *Uncertain DTV must-carry*: To the extent the FCC links the UHF handicap to must-carry, there is no must-carry guarantee for digital television signals. The FCC has just commenced this proceeding.

- *Multiple DTV channel shifts*: Many existing UHF stations are located on channels that will no longer be used for television broadcasting. Some of these UHF stations have been assigned DTV stations outside the final core DTV channel allotment. In either instance, these stations will suffer a considerable disadvantage.

- *Few DTV viewers*: For the near future there will be relatively few DTV receivers, hence DTV viewers. Thus, DTV will not help the UHF disparity in the near term.

- *Reception problems*: At this point in time, multi-path interference may cause significant reception problems, especially indoors. This problem will be compounded with the power disparities that exist in the DTV table. Over-the-air reception problems will no doubt be considerably greater in the DTV world than they were in the analog world during the 1970s.

Opponents of the UHF discount provide little analysis and no evidence that the deployment of DTV will eliminate the disparity between UHF and VHF facilities.[32]

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[31]ALTV does not dispute the FCC's decision to permit increases in power. To the contrary, we supported these power increases. Nevertheless, the result will be to increase the interference and, hence, the technical handicap of existing UHF analog stations above that which existed in 1984. The FCC should take this into account in the context of its national ownership rules by retaining the UHF discount.

[32]*See e.g.* Comments of NBC at 16. According to NBC "[A] large majority of all television station will operate on UHF frequencies under the Commission's new table of DTV allotments. Retention of the discount serve no legitimate purpose under these circumstances."

D. The UHF Discount Fosters Diversity and Competition

Several opponents of the UHF Discount argue that the discount increases concentration thereby threatening diversity. To the contrary, the discount fosters diversity and competition.

ABC's and NBC's Comments exemplify the need for the discount. As ALTV observed in its initial comments, one of the original justifications for the discount was the creation of new, *ad hoc,* networks that would compete with the traditional big three. The UHF discount has exceeded these objectives, helping to create fully competitive networks. It is, therefore, not surprising that ABC and NBC would like to eliminate a rule that: 1) helped create the Fox network, 2) is important to Tribune (which is one of the cornerstones of the WB network), and 3) is vitally important to the success of the new Pax TV network.

There can be no question that ABC and NBC are responding to the competitive challege resulting from new, emerging UHF-based networks. There is no better evidence that the discount has promoted competition both in local markets as well as at the network level.

The Center for Media Education, *et al.* argues that diversity is harmed because of increased concentration. It notes that UHF owners have an unfair competitive advantage over VHF owners.[33] UHF incentives have been a part of the national ownership rules since the 1950s.

NBC offers no evidence or analysis to support this assertion and ignores the basic technological limits of the DTV allocations table.

[33] *See* CME Comments at 18-19.

The audience cap discount has been around since 1984. Certainly any company has an opportunity to avail itself of the discount. Quite frankly, no one familiar with the industry has ever claimed that a UHF station has an "unfair" advantage over a VHF facility.

The discount has been used to create new, free over-the-air television networks to combat the dominance of the big three television networks. These information sources are universally available to all Americans, not just those who can afford pay services. From a diversity and public policy perspective, free, over-the-air networks are extremely important -- far more important than another pay service. Achieving this goal was the intent of relaxing the ownership rules in 1984. The UHF discount provided an opportunity for weak UHF stations to harness economies of scale that were necessary to compete with, and provide an alternative to, the big three networks. The discount has worked.

CME is concerned that increased concentration will squeeze out opportunities for minorities and suppress their viewpoints. It is therefore ironic that the two networks that are dedicated to serving the Hispanic audience in the United States, Telemundo and Univision, both urge the FCC to keep the discount. Univision states:

> In light of Univision's reliance upon UHF stations and cable carriage to provide the nation's Hispanic population with Spanish-language programming, the Commission's decision to review its UHF discount and cable/television cross-ownership rules is of particular importance. If Univision and other UHF broadcasters are to continue to provide their audiences with quality programming,

> both the UHF discount and the cable television cross-ownership rules must be maintained.[34]

Telemundo, which is the major competitor to Univision in Hispanic broadcasting, voices similar concerns:

> As the Telemundo station group moves toward the next century, it will undoubtedly face new economic and programming challenges... Telemundo's ability to meet these challenges will be enhanced if it is able to acquire additional stations that can serve as affiliates of the Telemundo network, thereby increasing the network's coverage in key Hispanic markets. Retaining the UHF discount rule will provide the Telemundo station group with the flexibility to make these strategic acquisitions.[35]

CME has forgotten one important point. The UHF discount was devised to remedy the inherent problems associated with the FCC's original table of allocations. That table created relatively few large VHF stations in each market. As a result, the American public was limited to three major broadcast networks for years. For decades, FCC policy was directed towards developing competitive networks to the big three. One of the primary stumbling blocks was that new networks had to rely on inferior UHF facilities. The discount permitted UHF owners to harness economies to create new competitive networks, like Fox, UPN, WB, Pax TV, Univision, and Telemundo, to help compete with the traditional three networks. This has promoted competition at both the national and local levels.

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[34]Comments of Univision at 2.

[35]Comments of Telemundo at 5.

II. The Broadcast/Cable Television Cross-ownership Rule Should be Retained

ALTV submits that the cable/television cross-ownership rule should be retained. We are not alone in this view.[36] Not surprisingly, the three major networks and cable interests also urge elimination of the rule.[37]

As we observed in our initial comments, our concerns with eliminating the cable/television cross-ownership rule are different from the Commission's initial observations in the *Notice*. We believe there are plenty of diverse, competitive outlets in both local markets and at the national level. In this regard, we agree with NBC that local television broadcasters should have a chance to compete and own multiple channels in a market.[38]

Relaxing the cable/broadcast cross-ownership rule, however, involves a different set of considerations. Common ownership in a local market is hardly bad *per se*, but a direct competitor's control over the video pipeline in a local market gives us pause. Over 65 percent of a TV station's audience watches its programs via the cable conduit. Control over the spigot

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[36]*See e.g.* Comments of NAB, Comments of the Network Affiliated Stations Association, Comments of Univision, Comments of the National Organization for Women Foundation, Comments of Office of Communications United Church of Christ, Comments of Center for Media Education, *et al.*

[37]*See e.g.* Comments of ABC, Comments of NBC, Comments of CBS, Comments of NCTA, Comments of Time Warner, Comments of Ameritech New Media.

[38]*See* NBC Comments at 18.

raises significant competitive concerns which must be addressed.[39] The real issue is whether the FCC will permit a local industrial structure in which one of the participants has the technical ability to act in an anti-competitive manner by blocking the signals of its competitors. If so, then the diverse, competitive marketplace which exists today will not be there tomorrow.

The concerns that led Congress and the FCC to enact must-carry and channel positioning protection are clearly applicable in this case. Cable systems, which compete with local television, have strong incentives to discriminate against local television stations with respect to carriage and channel positioning. Such activity enhances the economic position of the cable system. These incentives increase exponentially in the case of a commonly-owned television/cable system. Engaging in such anti-competitive behavior would enure to the benefit of both the local cable system and the commonly-owned broadcast station.

Some commenters supporting elimination of the rule state that the existence of the present must-carry rules obviates these concerns.[40] Unfortunately, they do not.

First, no must-carry rules for new digital over-the-air television stations have been adopted. Cable's disdain for digital must-carry is well known. There is no question that a cable

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[39]We realize this was not the original concern of the rule. Nonetheless, carriage and other concerns have been raised before in the context of this rule.

[40]*See e.g.*, Comments of NBC at 17, Comments of Time Warner Cable at 18.

system cross-owned station would use its power over the pipeline to harm the digital rollout of local competitive broadcast stations.

The potential for anti-competitive conduct exists at the national level as well as the local level. Assuming a merger between a current broadcast network and a large cable operator takes place, the new entity would be able to discriminate against competitive broadcast networks.[41] For example, a hypothetical MSO/Broadcast network would be able to discriminate against the competing networks and group owners on their commonly owned cable systems. (This cannot be accomplished today because the networks cannot own cable systems in markets where they have owned and operated stations.) The potential consequences for digital television are staggering. Commonly owned cable/network combinations could: 1) save capacity on their owned and operated cable systems by denying carriage to competing local digital television signals, 2) gain a "first mover" advantage in the local digital television broadcast business, and 3) gain a first mover advantage in the national digital broadcast network business.

In this regard the comments of Time Warner Cable are instructive. Time Warner correctly observes that the D.C. Court of Appeals in *Melcher vs. FCC* upheld the FCC's ban on cable owners and LECs from obtaining licenses to distribute local multipoint distribution

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[41]As the *Notice* observed, it is the broadcast/cable cross ownership rule that has checked network cable combinations.